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AUG 4 1972

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 72-204

B. G. SOLOMON,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Supreme Court of the United States

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SEABOARD COAST LINE RAILROAD COMPANY, A BODY CORPORATE,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, B. G. Solomon hereby petitions for a Writ of Certiorari to review the decision of the Virginia Supreme Court made on May 11, 1972 which affirmed the decision of the Trial Court.

OPINIONS BELOW

The opinion of the Virginia Supreme Court decided on May 11, 1972 is appended hereto in the appendix.

The opinions of the Trial Court sustaining Seaboard's motion to strike the petitioner's evidence and enter summary judgment for the Seaboard is appended hereto in the

appendix. Neither the opinion of the Virginia Supreme Court nor the opinion of the Law and Equity Court of the City of Richmond will be officially reported.

JURISDICTION

The order sought to be reviewed was made and entered on May 11, 1972. No petition for rehearing was made nor was there any extension granted to file this petition for certiorari. The Statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Was there sufficient evidence to make a jury issue under the Federal Employers' Liability Act as to whether the Seaboard was negligent or failed to furnish the petitioner with a safe place to work and that such negligence or failure to provide a safe place to work contributed in whole or in part to petitioner's injuries?

2. Does the decision of the Court below infringe upon and restrict the right of a railroad employee to have a jury determine issues of negligence and causation according to the provisions of the Federal Employers' Liability Act and the cases decided by this Court?

STATUTE INVOLVED

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories. . . shall be liable in damages to any person suffering injury while he is employed by such

carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment." (See 45 U.S.C.A. Section 51, Federal Employers' Liability Act, page 150)

STATEMENT OF THE CASE

The petitioner, an employee of the Seaboard, filed a motion for judgment under the Federal Employers' Liability Act against the Seaboard for serious and permanent injuries alleging that the Seaboard was negligent in requiring him to perform duties not within his job as a hostler and/or failing to furnish him a safe place to work. The matter was tried before a jury and after the presentation of the petitioner's evidence, the Trial Court sustained Seaboard's motion to strike the evidence and entered final judgment for the Seaboard (App. 6).[1] The petitioner then appealed to the Virginia Supreme Court alleging in its assignment of error that the Court erred in striking his evidence (App. 7). The Virginia Supreme Court did not find any reversible error and affirmed the decision of the Trial Court (App. 9).

Solomon was employed with the Seaboard as a hostler on September 9, 1967 and worked in and near Hamlet, North Carolina. On this date, Solomon reported to work at the Seaboard's Passenger Station in Hamlet at 2:00 a.m. (T-31), and was due to get off at 10:00 a.m. (T-32). A hostler's duties included adding and taking off Seaboard

[1] Reference will be made in the following manner: App. means appendix in petition for certiorari; T- means printed transcript.

engines that came into the passenger shop, watering and refueling engines, and transporting engines between the passenger shop in Hamlet and the Seaboard's diesel shop three to four miles north of Hamlet (T-24) where the engines were serviced and maintained. On September 9, 1967 Solomon spent the good part of his work shift fueling and watering engines that came into the passenger station (T-31). Solomon was then ordered to take three engines from the passenger shop to the diesel shop (T-32). Solomon arrived at the diesel shop at 9:30 a.m. (T-33).

Upon his arrival at the diesel shop, Solomon was ordered by a Seaboard supervisor to take a truck and drive himself and his helper back to the passenger station where he was to quit working (T-54). According to Solomon, it was not part of his duties to operate a truck, as a hostler was not customarily required to operate a truck (T-27, 29). Hostlers were governed by the same rules as enginemen, firemen, and trainmen, which rules did not require the operation of motor vehicles (T-31). If Solomon was at the passenger shop and the Seaboard needed him at the diesel shop, they would have sent someone down to the diesel shop to pick him up (T-25). Most of the time Solomon traveled between the passenger shop and diesel shop by rail (T-25, 26). If Solomon was not traveling by rail, the Seaboard would get a laborer to drive him back to the passenger station (T-33, 34). Solomon's helper never drove a truck and he never rode in a truck driven by his helper (T-26).

In accordance with the orders of the Seaboard, Solomon drove a Seaboard truck back to the passenger station on N. C. Route 177 (T-49). Route 177 was a two-lane, eighteenfeet wide road with a posted speed limit of 55 m.p.h. (T-49). It was raining and the roads were slick (T-48). As Solomon approached a curve, he saw an oncoming car

in trouble coming toward his path (T-47). Solomon was going approximately 45 m.p.h. and immediately braked the truck down and pulled off the highway (T-48). The first car slid by Solomon, and Solomon had already applied his brakes hard when a second vehicle slammed into him while he was going 30 to 35 miles an hour (T-49). Solomon did not stop as he thought he should have (T-49, 51). Solomon began braking about 300 feet away and began braking hard one hundred fifty feet away (T-51).

Several expert witnesses were also called by Solomon. Hughes, an engineer who had worked for the Richmond, Fredericksburg and Potomac Railroad for 31 years, was familiar with hostling work (T-68). Hughes indicated that on the Richmond, Fredericksburg and Potomac, the railroad would move a hostler from one location to another by locomotive (T-71), and in the event there was not a locomotive, the railroad furnished transportation and the man would not be required to operate the vehicle (T-71, 73).

Larry Oakley, an employee of the Norfolk and Western for sixteen years as a fireman and engineer, was also familiar with hostling and the duties of a hostler (T-75). The duties of a hostler did not require him to operate motor vehicles (T-75). In the event the hostler was not transported by rail, the railroad would send a car with a qualified driver (T-76).

Solomon sustained serious injuries requiring hospitalization for 28 days and lost $6,500.00 in wages (T-8, 10). The lower five teeth in Solomon's jaw were dead as a result of the accident and required extensive root canal therapy at the University of North Carolina (T-4 de bene esse deposition of Dr. Cathey) and permanent damage was done by the loss of nerves (T-6 de bene esse deposition of Dr. Cathey). X-rays and examination showed five upper teeth

were lost along with substantial bone loss (T-8 de bene esse deposition of Dr. Sowter). Medical evidence also revealed marked lacerations of the face and scalp (T-6 de bene esse deposition of Dr. Green) a fracture of the right mid humerus (T-6 de bene esse deposition of Dr. Green) a fracture of upper end of tibia (T-8 of de bene esse deposition), fractured ribs (T-8 of de bene esse deposition), and a fractured left patella tendon (T-14 of de bene esse deposition).

The Trial Court refused to allow opinion evidence of Solomon's expert that travel by rail is safer than travel on the highway (T-102), or the testimony of Solomon that it took ten to thirty minutes to get an available person to drive the vehicle (T-44).

REASONS FOR GRANTING THE WRIT

This Court has zealously protected the right of a railroad employee to have a jury pass on issues of negligence and causation under the Federal Employers' Liability Act.

> "In passing upon whether there is sufficient evidence to submit an issue to the jury, we need only to look to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremtory instruction has been given." See *Webb* v. *Illinois Central Railroad Company*, 352 U.S. 512, 77 S.Ct. 451, 1 L. Ed. 2d 503 (1957).

It has long been held that the sufficiency of the evidence in an action in a state court under the Federal Employers' Liability Act to support a finding of a right to recover is a federal question reviewable by the Supreme Court of the United States. See *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L. Ed. 239 (1943).

In reviewing, the sufficiency of the evidence of a Federal Employers' Liability case in a state court, this Court in the landmark case of *Rogers* v. *Missouri-Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493 (1956).

> *"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that empolyer negligence played any part, even the slightest,* in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. *Judicial appraisal of the proofs to determine whether a jury case is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights to make that appraisal and, if that test is met, are bound to find that a case for the jury is made whether or not the evidence allowed the jury a choice of other probabilities.* The Statute expressly imposes liability on the employer to pay damages for injury or death 'in whole or in part' due to its negligence." See *Rogers, supra,* at 506, 507. (Italics ours.)

> "Special and important reasons for the granting of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination." See *Rogers, supra,* at 510.

A suit under the Federal Employers' Liability Act significantly differs from common law negligence in terms of the standard of proof and that it was the intent of Congress to secure railroad employees a jury trial in a larger portion of cases than would be true in ordinary negligence actions. A jury trial is a part of the remedy. See *Atlantic and Gulf*

Stevedores v. *Ellerman Lines*, 369 U.S. 355, 360, 82 S.Ct. 780, 7 L. Ed. 2d 798 (1962). See also *Tennant* v. *Peoria and P. U. R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L. Ed. 520 (1944).

Solomon did not have to prove common law causation but only that his injury resulted in whole or in part from the Seaboard's negligence. See *Crane* v. *Cedar Rapids and Iowa City Railway*, 395 U.S. 164, 166, 89 S.Ct. 1706, 23 L. Ed. 2d 176 (1969).

Here there was sufficient evidence to make a jury issue as to the Seaboard's negligence which in whole or in part caused Solomon's injuries. The record undisputedly indicated that it was not Solomon's duty to drive a Seaboard truck, that it was the Seaboard who ordered him to drive the truck because of the unavailability of laborers or personnel and that as a result Solomon sustained serious and permanent injuries. Evidence also indicated that the roads were slick because of the rain which the Seaboard knew or should have known of and that the brakes on the truck only slowed the truck down to 30 to 35 miles per hour from 45 miles per hour, although the brakes had been applied hard over 150 feet.

In *Davis* v. *Virginian R. Co.*, 361 U.S. 354, 80 S.Ct. 387, 4 L. Ed. 2d 366 (1960) the plaintiff was a railroad conductor who alleged that the railroad was negligent in requiring the shifting of cars at a fast rate with inexperienced help. There the conductor slipped on a ladder while descending from a car. No evidence was admitted to show that the ladder was negligently maintained or that there was any foreign substance on the ladder. The lower court struck the plaintiff's evidence and this action was approved by the Virginia Supreme Court. This Court then held that there was evidence for the jury to pass on and remarked

that the conductor would have been working on the ground rather than on the railroad cars, but for the inexperience of the brakeman, and that the conductor was required to engage in a function not ordinarily performed by the conductor.

CONCLUSION

Petitioner submits there was sufficient evidence to make a jury issue as to whether the Seaboard was negligent or failed to provide a safe place to work which in whole or in part caused Solomon to suffer serious and permanent injuries. This Court in the past has granted certiorari to insure that the intent and language of the Federal Employers' Liability Act is uniformly applied by the state courts of this country. This Court should grant certiorari to protect a railroad employee's right to a jury trial which is a part of the remedy under the Federal Employers' Liability Act.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of *B. G. Solomon* v. *Seaboard Coast Line Railroad Company* were deposited in the United States mails, first class, prepaid to Eppa Hunton, IV and Joseph M. Spivey, counsel of record for the respondent, Seaboard Coast Line Railroad Company, at their office of Hunton, Williams, Gay and Gibson at 700 East Main Street, Richmond, Virginia, on the 3rd day of August, 1972. It is further stated that the Petition has been served on all parties.

RAYMOND H. STROPLE

APPENDIX

Virginia:

In The Law And Equity Court Of The
City Of Richmond

B. G. Solomon,

Plaintiff,[1]

v.

Seaboard Coastline Railroad Company,

Defendant.

Date: November 5, 1971

Before: The Honorable Robert L. Young Judge and Jury

MOTIONS AND ORAL OPINION OF TRIAL COURT

IN CHAMBERS

Mr. Spivey: Your Honor, at this time, on behalf of the defendant, I would move the Court to strike out the plaintiff's evidence and enter up summary judgment for the defendant on the grounds that there is not the slightest showing in this case that there is any evidence of negligence on behalf of the plaintiff against the Seaboard.

The elements of their case seem to be that we have failed to furnish them with a safe place to work, but there is no evidence that it was not a safe place to work.

Now, we have admitted that he was in the course of his employment, and I think it is true that he was in the course

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[1] The Law and Equity Court of the City of Richmond does not assign docket or case numbers to cases filed in that Court.

of employment until he got to where he was going to stop work that day. Even if he had been furnished a chauffeur, as they claim he should have been, there is no showing that the chauffeur wouldn't have been involved in that accident.

The Court: I showed my age by referring to Barney Oldfield, didn't I?

(Laughter.)

Mr. Spivey: In any event, Judge, with respect to the furnishing of the chauffeur and the operation of the truck, I suppose I agree with the Court's observation that Barney Oldfield himself couldn't have avoided the accident. The only point that they make is if he would have been furnished a chauffeur, he would not have been at that point at that time. Well, that is not necessarily so.

The Court: Well, I have overruled that.

Mr. Spivey: There is no showing that Seaboard had any control over this highway. Even stretching it out to the limits, there is no showing that the other driver of the truck that hit the man was a Seaboard employee.

This is a very strange and curious case, Judge, and for the life of me—

The Court: Well, it is like all these cases. It is a heart-rending case. This isn't a guy coming in and saying he has this misery when he wasn't even touched. This man was hurt.

Mr. Spivey: We admitted that in the opening statement, Judge. I think it is somewhat less heart-rending when it is realized that his hospital and doctor bills have been paid for.

And it looks to me like he has a mighty fine cause of action against the fellow that slid over and hit him.

Mr. Strople: But you have intervened in that case in North Carolina, claiming to get your hospital bills back.

The Court: I didn't think you all did that. I have known guys at the C & O out at Clifton Forge, and they never asked for their hospital bills back. I am not an arbiter of that.

Mr. Hunton: There are two suits pending in North Carolina.

Mr. Spivey: The man will come out whole in this thing, Judge. But that is not really the point here.

The Court: I am no authority on all FELA cases. I have read the cases that you are talking about.

I remember reading about the bite case when it first came out in the United States Supreme Court reports, and I read them from time to time. And I used to hear them argued down in Federal Court, but it has been twenty years since I stopped going in the Federal Courts.

But I just don't see anything to this case, gentlemen, except here is a man routinely, that if they don't have another engine to bring him back or some other railroad conveyance, he goes by truck. They go by company truck. That was all part and parcel of his work.

Sometimes he drove; sometimes other people drove. More often it was others. But it wouldn't have made a particle of difference who was driving.

Assume that I am right. I have ruled on the evidence on those two points, and I am satisfied that I have ruled right. Now, do you have anything left, gentlemen?

Mr. Strople: Yes, sir, I think we have a couple of points. First of all, Mr. Solomon testified that the highway was wet and slippery, and the testimony has been that it had been raining for some time and was at the time.

Now, the only evidence as to the other cars was that they were sliding. There was no evidence of any speed. I admit that there is evidence that they were on the wrong side of the road, but at this point of time—

The Court: No. He said it was fishtailing. There was testimony that the first car was fishtailing and that the second car came around in such a manner that they engaged side to side. So he had to be crosswise of the road.

Mr. Spivey: That was in Mr. Moody's opening statement, Judge.

The Court: I mean I am just trying to recall the evidence.

Mr. Strople: I think he said that they were behind each other and the first one started fishtailing, and he got off the road, and the next thing he saw, the second one was sliding, and he missed the first one. And he admitted the car was sliding on the wrong side of the road. The impact was on the wrong side of the road.

But at this point in time, I think the railroad's answer is that Johnny Ray Dawkins was the proximate cause of this accident, and there has been no evidence of that except that he was sliding and ran into the plaintiff.

And, another point, Judge, about the control. I don't think there is any allegation under the law that we have to show that the railroad had any control over this highway. It is just like the premise of any third party as in the *Schenker* case.

An I have got a lot of cases here, Judge just holding that as a matter of law the railroad is responsible to provide any railroad employee a safe place to work, whether it is on the premises or anywhere else.

The other part of this, Judge, at this point, Mr. Solomon

did indicate that when he saw this thing he got off, and he started braking, and he didn't think his truck stopped as fast as it should have. And there was evidence there where the impact was and how the impact was. And I would think from that he has raised an issue as to how the brakes worked. He did say it was a good working truck and a good running truck, but he said the brakes just didn't catch like they should have.

The Court: He didn't go quite that far. He said he didn't get all the way stopped, and so forth, but I assume that it was because he was on wet pavement and then on a wet shoulder. I mean he didn't give any statement from which you could infer defective brakes.

Mr. Strople: Well, he said that he was doing forty-five, and he said he was going thirty or thirty-five at the time of the impact. He testified as to distance. The Seaboard has put in no evidence in there that there were any skid marks at the scene on the road or on the dirt. These are some of the other points that we are talking about, Judge. I know you have ruled on some of these.

I don't want to belabor you on it, but the FELA was passed by Congress, and the concept is that any prohibitive facts which any jury can make any inference from are a question from the jury, and that is the law. It is entirely different from the common law, and I think that we have—

The Court: Well, it is supposed to be in the common law, except they make a very, very liberal interpretation of it, I will admit that.

Mr. Strople: I just think at this time, Judge, that under the law of the FELA we have made a jury case at this time. They haven't put on any evidence, and they haven't shown an intervening cause as a matter of law at this time, I don't believe, Judge.

The Court: Well, is there anything you want to say, sir?

Mr. Moody: Judge, I think that Mr. Strople has pretty well covered the law. Of course, there are several factors that were mentioned by him that are in this case which we feel is sufficient for the matter to be considered by the jury, Your Honor, in this case on the safe place to work theory.

They put him there and it was according to our evidence that it involves the question of safety. It was not a safe place. We feel the jury certainly could conclude that. And we think it is a jury question at this point.

I admit that the gentleman from the Norfolk and Western Railroad said that they also at times would use motor vehicles, but they usually used the engines. And they would transport them back to their point where they came from by an engine. So I think that we do have sufficient evidence here to submit the case to the jury.

The Court: Motion sustained.

Mr. Strople: Note our exception, please.

IN OPEN COURT

The Court: Gentlemen, I don't know whether you have met with this type of situation before in your services, but in those cases based upon negligence there is a preliminary question for the Judge to say whether or not any issue has been raised for the jury to pass upon. In this case I have ruled that there is not, and so I will just discharge you from further consideration and bring up a final judgment for the defendant.

Court Adjourned at 2:55 o'clock P.M., November 5, 1971.

Virginia:

In The Court Of Law And Equity For The
City of Richmond

B. G. Solomon,

Appellant,

v.

Seaboard Coast Line Railroad Company,

Appellee.

NOTICE OF APPEAL
AND
ASSIGNMENTS OF ERROR

To: Luther Libby, Clerk
Court of Law and Equity
Richmond, Virginia

The Appellant, B. G. Solomon, pursuant to Rule 5:1 § 4 of the Rules of Court, hereby gives notice that he will petition the Supreme Court of Appeals of Virginia for a writ of error to a final judgment rendered on the 5th day of November, 1971, and the said appellant states the following assignments of error which he will rely on in said appeal.

ASSIGNMENTS OF ERROR

1. The Court erred in striking the plaintiff's evidence and entering summary judgment for the defendant, as there was sufficient evidence to make a jury issue under the Federal Employers' Liability Act as to whether the railroad was negligent or failed to furnish the plaintiff with a safe place to work and that such negligence or failure to provide a

safe place to work contributed in whole or in part to plaintiff's injuries.

2. The judgment of the Court is contrary to the law and the evidence.

3. The Court committed prejudical error in not allowing the testimony of B. G. Solomon as to how long it would take the Seaboard to get a driver for the truck to carry Solomon back to the passenger station and how long it took Solomon to get the truck in question which prejudiced Solomon.

4. The Court committed prejudicial error in not allowing the expert testimony of Dr. Hall that transportation by rail is a safer mode of transportation than transportation on the highway system.

B. G. Solomon"

By: Raymond H. Strople

Willard J. Moody, Esquire
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200 Professional Building
Portsmouth, Virginia 23704

I certify that a copy of the foregoing Notice of Appeal and Assignments of Error was mailed to Eppa Hunton, IV, Esq., Hunton, Williams, Gay, Powell and Gibson, 700 East Main Street, Richmond, Virginia, counsel for the Seaboard on the .... day of December, 1971.

.....

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 11th *day of* May, 1972.

Virginia:

In The Law And Equity Court Of The
City of Richmond

B. G. Solomon,[2]

Plaintiff,

v.

Seaboard Coastline Railroad Company,

Defendant.

The petition of B. G. Solomon for a writ of error to a judgment rendered by the Law and Equity Court of the City of Richmond on the 5th day of November, 1971, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Seaboard Coast Line Railroad Company was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said Law and Equity Court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk

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[2] The Supreme Court of Virginia does not assign case numbers until after an appeal has been granted.